IN THE

Supreme Court of the United States

October Term, A. D. 1904.

No. 47.

FANNIE N. DRESSER CRAMER, TAYLOR A. SNOW and HENRY H. GAGE,
Plaintiffs in Error,

vs.

FREDERICK R. WILSON,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

Reply Brief for Plaintiffs in Error.

I.

THE ASSIGNEE'S TITLE.

Counsel for defendant in error argue (Brief, p. 22) that inasmuch as Frederick R. Wilson had made a conveyance of the land in question to his sister, before he was adjudged bankrupt, it follows necessarily that his assignee in bankruptcy took no interest in said lands. This argument tacitly assumes, as a minor premise, the proposition that "the assignee in bankruptcy took no greater or other interest than the bankrupt himself had."

The Illinois Supreme Court assumed the same proposition, but declined, or at least omitted, to consider whether it was sound or not.

The proposition is one of law, and not of fact. We contend that it is *not* the law. Defendants in error claim that it *is* the law. The difference presents a federal question.

In our original brief herein (p. 32) we cite authorities to the effect that under the bankrupt act of 1867 all property that had been conveyed by the bankrupt in fraud of creditors passed to the assignee immediately upon his appointment, and that he thereby acquired greater rights than the bankrupt himself possessed. The Illinois courts in effect, and almost in words, denied that the assignee acquired any rights whatever, except such as the *bankrupt* had, and that a conveyance good as against the bankrupt was also good as against the assignee. We contend that such is not the law.

Whether or not that is the law is a federal question.

Among the facts to which we sought to apply the law, are the following:

June 22, 1877, Seaverns, a creditor, sues F. R. Wilson.

July 6, 1877, Wilson conveys 110 pieces of property to his helpless, invalid, non-resident sister, whose only heir at law he expected to be, and later was; reserving a secret trust.

July 14, 1877, Seaverns obtains judgment against F. R. Wilson.

August 30, 1878, Wilson is adjudged bankrupt.

March 23, 1889, Wilson first discloses the secret trust (p. 262).

June 17, 1889, Seaverns petition[illegible]e the land sold by the assignee, to pay debts (p. 2[illegible]

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June 27, 1889, the District Court orders the assignee to sell at public auction "the interest of said bankrupt *and of said assignee*" (p. 298).

July 20, 1889, the assignee sells "all the right, title, claim and interest of the said bankrupt *and of the undersigned assignee as aforesaid*" (p. 301).

February 18, 1903, the Supreme Court of Illinois hands down an opinion that the "assignee was directed to sell *only* the interest of Frederick R. Wilson in the premises" (p. 315).

We respectfully urge that the assignee acquired and sold not "*only*" the interest of F. R. Wilson, but also whatever interest he had conveyed in fraud of creditors; that such has always been the construction placed upon the Bankrupt Act of 1867; that the state courts in this case erred in placing a different construction upon it; and that the error raises a question of law, and of federal law.

II.

RES JUDICATA.

In their brief on the merits counsel for the defendant in error state (p. 38) that said Wilson has, "subsequent to the assignee's sale, become the owner of the property under the last will and testament of Julia Wilson," and that for that reason the decision of the United States District Court is no longer *res judicata* as against Wilson and his present title. That is a mistake we wish to correct lest this court may be misled by it.

The sale by the assignee to Taylor A. Snow was made July 20. 1889 (p. [illegible]nd the devise from Julia Wilson to her brother to[illegible] at her death December 15, 1887 (p. 122), nearl[illegible]en months before.

It will be seen, therefore, that at the time F. R. Wilson petitioned to have the assignee's sale set aside (Sept. 17, 1889), he was devisee of Julia Wilson. There was then no outstanding claim in Julia Wilson that he afterwards acquired. He then claimed by the same title that he now claims by, namely, a devise from his sister Julia Wilson. He then asked the United States District Court to set aside said sale, for the same reason that he afterwards asked the Illinois state courts to set it aside, namely, that he had acquired the said property "within the last three years" (p. 304); and although the federal court refused to set aside the sale, the state courts afterwards, in this proceeding, did set it aside, and for the same reason formerly urged in vain.

The court will please observe that Frederick R. Wilson, *devisee* of Julia Wilson who filed his petition in the United States District Court on the 17th of September, 1889, is the same Frederick R. Wilson *devisee* who now appears before this court; and that the Illinois Circuit and Supreme courts have in effect granted the same prayer that the United States District Court denied in 1887. The same claim of title was set up and "necessarily involved" there, as is set up and involved here.

Julia Wilson, it is said, was not a party to that proceeding. True, she was not personally;—she had long since died—but her devisee *was* a party, and relied on her claim or title devised to him.

We respectfully urge that the decision of the District Court for the Northern District of Illinois in 1889 should be given greater effect than the state courts have given it in this case. State courts should not be allowed to ignore decisions of federal courts in that manner. We claim as purchasers under the sale and decision of the federal

court, and our claim has been disallowed by the state courts; which also is a federal question.

III.

NO FINDING BELOW ON QUESTION OF FRAUD.

It is said by counsel (p. 24) "that the state courts found that the conveyance to Julia Wilson was not fraudulent as claimed by the plaintiffs in error, but that said conveyance was made in good faith and supported by an adequate consideration." Not so. The decree of the trial court (p. 46) and the opinion of the Supreme Court (p. 311) will be searched in vain for any such finding, or any finding on the question as to whether the said deed was or was not a conveyance in fraud of creditors. *The question was simply ignored.* And hence it cannot be said that this case is within the rule, that on error to a state court *when the facts are found by the court below*, this court is concluded by such findings.

IV.

BANKRUPTCY INTERRUPTS THE RUNNING OF THE STATUTE OF LIMITATIONS.

Counsel contend that a fraudulent conveyance, coupled with sale by the assignee in bankruptcy, does not as a matter of law interrupt the statute of limitations.

F. R. Wilson's only claim sustained by the state courts, rested on continuous adverse possession for twenty years. His tax deed under which he entered upon the land was at most mere color of title. No bare tax deed, unaccompanied by proof of the validity of the tax proceedings, has ever been held in Illinois to confer title. So the mere tax deed may be dismissed from consideration as a source of title.

The trial court expressly found that the grantee under the tax deed did not pay all the taxes for seven years; therefore he could not couple his color of title with seven years' payment of taxes and thus bring himself within the seven year limitation statute. One tax, at least, was not paid by him during this period (p. 47).

The express basis of Wilson's title was twenty years' possession. The court found that it was not interrupted. We claim that the sale under the bankruptcy proceedings interrupted it, and counsel now urge (Brief, p. 42) that "even if it be conceded that the conveyance to Julia Wilson was fraudulent, that did not arrest the running of the statute of limitations." They do not give to the Bankrupt Act of 1867 the same construction that we do. We contend that in case of a fraudulent conveyance, the title or claim vests in the assignee for the benefit of creditors immediately upon his appointment. The possession of the bankrupt might, possibly, be tacked to the possession of the assignee, but can certainly not be tacked to the possession of the fraudulent grantee. See authorities on page 37 of our original brief.

This is another federal question involved.

These federal questions are the same, expressed in different words, that are stated in our original brief (p. 20) as the "Questions Involved."

Our position on each question seems to be controverted by the counsel for defendant in error;—they seem to be questions of law; and they seem to us to be questions of *federal* law; and the decision of the state courts seems to have denied the title, privilege or immunity we claim.

Indeed counsel pass almost at the commencement of their brief from "No federal question is involved" to a statement and argument of the federal questions above men-

tioned, under the heading "The case should be affirmed on the merits."

V.

NO QUESTION OF COLLUSION INVOLVED.

There was no issue of "collusion between the claimants" involved in this case as presented by the pleadings. Much that is said on that subject in defendant's brief does not appear at all in the record. At the trial counsel sought to show collusion between Gage, Snow, and the Dressers, but only succeeded in showing that the Dressers had agreed to sell their lands to Gage when they had made their title good. There was nothing improper in that, and if it was improper the issue was not presented by the pleadings.

Co-tenants have an absolute right to have partition by bill in chancery, as much as the holder of a judgment note has a right to enter up judgment. The motive is immaterial. (*Trainor* v. *Greenough*, 145 Ill., 543; *S. Dakota* v. *N. Carolina*, 192 U. S., 286.)

The Supreme Court expressly refused to consider the question of collusion, saying (p. 313), "as that question was not raised below, and a final decree having been entered upon the merits, we will consider the same upon its merits here."

There being no such issue raised below, we consider it improper to attempt to show on this appeal either what evidence *was* admitted on that point, or what evidence *would have been* presented if the issue had been raised.

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